IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

FRIDAY, THE 28TH SEPTEMBER 2007 / 6TH ASWINA 1929

Crl.Rev.Pet.No. 3283 of 2007()

CRA.290/2005 of THE SESSIONS COURT, MANJERI
CC.711/2002 of JUDL. MAGISTRATE OF FIRST CLASS, MALAPPURAM

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REVN. PETITIONER: APPELLANT/ACCUSED

M.K.MOOSA, S/O HAMZA HAJI,
MANNETHODI HOUSE, ARAVANKARA,
POOKKOTTUR P.O., ERNAD TALUK,
MALAPPURAM DISTRICT.

BY ADV. SRI.R.RAJESH KORMATH

RESPONDENTS: RESPONDENT AND STATE/LRS OF DECEASED COMPLAINANT

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1. PARAKKAL RIYAZ MON,
S/O MUHAMMED HAJI, IRIKKOTTUPARAMBU,
MONGAM P.O., ERNAD TALUK,
MALAPPURAM DISTRICT.

2. STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.S. SIVAKUMAR

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 28/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

V.RAMKUMAR, J.

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Crl.R.P. No. 3283 of 2007

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Dated: 28-09-2007

O R D E R

In this Revision filed under Section 397 read with Sec. 401 Cr.P.C. the petitioner who was the accused in C.C. No.711 of 2002 on the file of the J.F.C.M., Malappuram challenges the conviction entered and the sentence passed against him for an offence punishable under Sec. 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act').

2. I heard the learned counsel for the Revision Petitioner and the learned Public Prosecutor.

3. The learned counsel appearing for the Revision Petitioner re-iterated the contentions in support of the Revision. The courts below have concurrently held that the cheque in question was drawn by the petitioner in favour of the complainant on the drawee bank, that the cheque was validly presented to the bank, that it was dishonoured for reasons which fall under Section 138 of the Act, that the complainant made a demand for payment by a notice in time in accordance with clause (b) of the proviso to Section 138 of the Act and that the Revision Petitioner/accused failed to make the payment within 15 days of receipt of the statutory notice.

4. The learned counsel for the revision petitioner contended that the power-of-attorney-holder who is the nephew of the complainant was not the person who had given the sworn statement and he does not have any direct knowledge with regard to the transaction between the complainant and the accused and, therefore,

he was not competent to tender evidence on behalf of the complainant who alone had the knowledge regarding the transaction in question and therefore the burden lay on him only in view of Sec. 106 of the Evidence Act. The Powers-of-Attorney Act, 1882 which is in the realm of procedure cannot override the substantive law namely the Negotiable Instruments Act, 1881. When Section 138 of the Negotiable Instruments Act enjoins that the complaint should be filed and maintained either by the payee or by the holder-in-due course, no other than person is entitled to file the complainant or pursue the same or give evidence in support of the complaint. He also relied on the decisions reported in **Promoters & Builders Association of Pune v. Pune Municipal Corporation and Others - (2007) 6 SCC 143** to contend for the position that the words in a statute have to be given the true and literal meaning and the court cannot under its interpretative process render it a meaning which is not in the contemplation of the legislature.

5. First of all the complaint in this case was filed by the complainant himself. The sworn statement was also given by the complainant. Thereafter, it was for the reason that he was ailing that his nephew was permitted to represent the complainant on the strength of a power-of-attorney. It was the power-of-attorney who submitted the proof affidavit and it was the power-of-attorney who tendered the evidence also. He has not deposed before court that he does not have any direct knowledge regarding the transaction. The very words spoken to by P.W.1 are "ഇടപാടിനെക്കുറിച്ച് അറിയാം" That means that he knows about the transaction. He was not asked as to what was the source of his knowledge, whether direct of indirect . Hence, it is idle for the revision petitioner to contend that the

power-of-attorney-holder was not competent to depose in terms of the averments in the complaint. The matter is already covered by the decisions in **Hamsa v. Ibrahim - 1993 (2) KLT 698, Naushad v. Naseema Beevi - 1994 (1) KLT 184, 2007 (7) KLT 984.** I, therefore, do not find any substance in the said contention.

6. Both the courts have considered and rejected the defence set up by the revision petitioner while entering the above finding. The said finding has been recorded on an appreciation of the oral and documentary evidence. I do not find any error, illegality or impropriety in the finding so recorded concurrently by the courts below. The conviction was thus rightly entered against the petitioner.

4. What now survives for consideration is the question as to whether a proper sentence has been imposed on the Revision Petitioner. The cheque amount was Rs. 71,700/-. Out of that, the revision petitioner had deposited before the trial court a sum of Rs. 7500/- leaving a balance of Rs. 63,500/-. Having regard to the facts and circumstances of the case, I am, inclined to modify the sentence imposed on the revision petitioner. Accordingly, if the revision petitioner pays to the first respondent complainant by way of compensation under Sec. 357 (3) Cr.P.C. a sum of **Rs. 63,500/- (Rupees sixty three thousand five hundred only)** within **five months** from today, then he need to undergo only imprisonment till the rising of the court. If the revision petitioner commits default in making the payment as aforesaid, he shall undergo simple imprisonment for three months by way of default sentence. The complainant shall be entitled to withdraw the sum of Rs. 7,500/- deposited before the trial Court.

This Revision is disposed of confirming the conviction but modifying the sentence as above.

Sd/-**V. RAMKUMAR, JUDGE.**

/true copy/

P.A. to Judge.

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